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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



FILE: WAC 01 185 54390 Office: CALIFORNIA SERVICE CENTER

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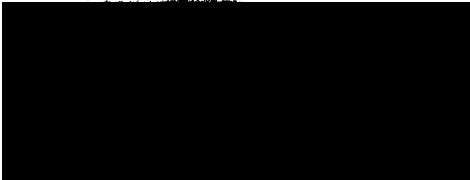
IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)


ON BEHALF OF PETITIONER:

PUBLIC COPY



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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prevent clearly unwarranted  
invasion of personal privacy

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 1993, and claims to be in the business of exporting high-tech products to China. The petitioner claims to have a subsidiary relationship with [REDACTED] located in Shandong, China. It claims one employee and \$76,000.00 in gross annual income. The petitioner seeks to employ the beneficiary temporarily in the United States as its executive director and general manager for a period of three years, at a yearly salary of \$36,000.00.

The director determined that the evidence of record was insufficient to establish that the U.S. entity would employ the beneficiary primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and states that the evidence is sufficient to demonstrate that the beneficiary will be employed primarily in a managerial or executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily—

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and

- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter of support dated March 27, 2001, the petitioner described the beneficiary's proposed duties in part as being responsible for "laying out strategies and principles, directing the company's operation, and expanding business in the United States." The petitioner also stated that the beneficiary would work with minimal supervision and would exercise independent discretion and authority to achieve company goals. The petitioner further stated that the beneficiary, overall, would be responsible for exercising his expertise in the areas of economic, financial, and personnel management to assure company growth.

In response to the director's request for additional evidence, the petitioner stated in part that the beneficiary's responsibilities would include:

- 1- 05 percent – Communicating with the parent company
- 2- 40 percent – Engaging in administrative work
- 3- 35 percent – Managing the finance of the company
- 4- 10 percent – Gathering data and analyzing economic trends in the United States
- 5- 10 percent – Attending conferences and establishing business connections

The petitioner submitted an organizational chart depicting the U.S. entity's hierarchy structure. The chart demonstrates a projected framework to include the beneficiary as executive director and general manager, with a secretary, financial manager, administrative assistant, and salesperson under his direction. The petitioner also submitted IRS tax records of the U.S. entity covering the years 1994 through 1997, and 1999 through 2000.

The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be coming to the United States to be employed primarily in a managerial or executive capacity. The director noted that the petitioner's tax records indicated that it didn't employ any employees in the year preceding the filing of the petition. The director therefore concluded that the beneficiary would be involved in the day-to-day operation of the business rather than primarily performing in a managerial or executive capacity. The director noted that even the 1994 through 1997 company tax records indicated that no more than two to three employees had been employed by the U.S. entity during that period. The director concluded by stating that based upon the company's past performance and its current financial status, it was obvious that the petitioner would not be able to support a managerial or executive position.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties as described qualify as managerial or executive in nature. Counsel states that the U.S. entity has been systematically been doing business in the United States for seven years. Counsel asserts that management has been implementing a new business plan to revive the U.S. entity's business, which would require the expertise of the beneficiary. Counsel uses excerpts from the record to describe the beneficiary's proposed duties as an executive. Counsel contends that the petitioner was involved in employee recruitment efforts prior to filing the petition and that it has hired two employees subsequent to the filing of the petition, and intends to hire two more in the near future. Counsel also contends that the two new hires will serve under the direction of the beneficiary. Counsel continues by stating that the foreign entity has since wired the U.S. entity a sum of \$200,000.00 as operation capital. Counsel further contends that the number of employees should not be the only criteria used in determining the beneficiary's eligibility as an intracompany transferee. The petitioner submits as evidence, copies of company payroll records dated July 31, 2001 and August 1,

2001, and a copy of a bank statement from the Bank of Canton of California dated July 31, 2001, showing a wire transfer for July 31, 2001.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed primarily in a managerial or executive capacity. The record reveals that the petitioner was established in 1993 and has been doing business for seven years. It is implied in the record that the U.S. entity is in a developmental stage. Counsel stated that the U.S. entity was in the process of reviving and restructuring its business as a result of business loss due to the "Asian economic crisis." It is also indicated from the record that the petitioner intends to hire four new employees. In the instant matter, the record reveals that the U.S. entity has been doing business for more than one year. Therefore, the petitioner does not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C) which allows the petitioning business one year to become sufficiently operational. The fact that the petitioner is in a restructuring stage of organizational development is considered, but does not relieve it from meeting statutory requirements. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel contends that the director erred in not taking into consideration the U.S. entity's plans to restructure the company and to hire additional workers. Counsel also asserted that the director was incorrect in concluding that the U.S. entity was financially unable to support a managerial or executive position. Counsel submitted payroll and bank documents on appeal in support of these contentions. Contrary to counsel's belief, evidence submitted on appeal will not be considered. The petitioner submits evidence that was not submitted to the director prior to her rendering her decision, and which was not in existence at the time the petition was filed. It is noted that the petition in the instant case was filed May 3, 2001. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, *supra*. Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

Furthermore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant matter, the record shows that the petitioner will not be able to support a managerial or executive position. The evidence is not sufficient to demonstrate that the beneficiary will be employed primarily in a managerial or executive capacity.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel

size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. At the time of filing, the petitioner was an eight-year-old import and export company that claimed to have a gross annual income of \$76,000.00. The company petitioned to employ the beneficiary as its executive director and general manager. The AAO notes that although the U.S. entity had employed two to three workers during the period of 1994 through 1997, the petitioner did not submit evidence that at the time the petition was filed it employed any subordinate staff members who would perform the actual day-to-day, non-qualifying operations of the company. The evidence of record demonstrates that the eight-year-old company had suffered from drastic business loss and was in the process of restructuring at the time the petition was filed. Based upon evidence of record, all plans to employ subordinate workers and development business relations are futuristic in nature and do not realistically reflect an ongoing, viable business entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Although the AAO recognizes the entity's hardship, it cannot excuse the company from meeting all eligibility requirements as an established business.

Further, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

When examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In addition, two elements generally characterize an executive or managerial position, which qualifies a beneficiary for L-1 nonimmigrant classification. First, the position must involve significant authority over the generalized policy of an organization or a major subdivision of an organization. Second, substantially all of the employee's duties must be at the managerial or executive level. In the instant matter, the evidence shows that the majority of the beneficiary's duties will be non-qualifying, functional duties rather than managerial or executive duties. The petitioner stated that 40 percent of the beneficiary's duties will encompass administrative work and 35 percent of his duties will involve managing the company's finance. Furthermore, there is insufficient evidence to demonstrate that the beneficiary possesses significant authority over the generalized policy of the organization or a major subdivision of the organization.

The beneficiary's proposed duties are described as being involved in the administration, sales, marketing and distribution of the petitioner's products. Since the beneficiary will be directly involved in the administration, sales, distribution and marketing of the petitioner's product he is performing tasks necessary to provide a service or product, and these duties are not considered to be managerial or executive in nature. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant case, it appears that the beneficiary will primarily perform the day-to-day services of the organization rather than the managerial or executive functions of the U.S. entity. There has been insufficient evidence submitted to demonstrate that the beneficiary exercises significant authority over the generalized policy of the organization or a major subdivision within the organization. In addition, although the petitioner stated that the beneficiary would be responsible for directing the company's operation, there has been no independent documentary evidence submitted to substantiate this claim.

Based upon a review of the petition and the evidence of record, it does not appear that the petitioner has developed to a point that it can employ the beneficiary in a predominantly managerial or executive position or that the majority of the beneficiary's duties would be primarily managerial or executive in nature. For these reasons, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.